No. 409P15 THREE-B DISTRICT

SUPREME COURT OF NORTH CAROLINA

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GREGORY P. NIES and DIANE S. NIES	)	From Carteret County
	)	No. 11CVS1569
v	)	No. COA15-169
TOWN OF EMERALD ISLE, a North Carolina Municipality	)	

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NOTICE OF APPEAL
(Constitutional Question)
and
PETITION FOR DISCRETIONARY REVIEW
UNDER G.S. 7A-31
(Filed 9 December 2015)
and
MOTION TO DISMISS APPEAL
(Filed 22 December 2015)

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FILED
DEC 9 2015
SUPREME COURT OF NORTH CAROLINA

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No. 409P15 THIRD DISTRICT

THE SUPREME COURT OF NORTH CAROLINA

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GREGORY P. NIES and DIANE S. NIES, Plaintiffs, v. TOWN OF EMERALD ISLE, a North Carolina Municipality, Defendant.	))))))))))	From Carteret County COA 15-169

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NOTICE OF APPEAL
UNDER N.C.G.S. § 7A-30(1) (CONSTITUTIONAL QUESTION)
AND
PETITION FOR DISCRETIONARY REVIEW
UNDER N.C.G.S. § 7A-31(c)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Pursuant to Rule 14 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-30(1), Plaintiffs (Nieses) hereby give Notice of Appeal from the judgment and published opinion of the North Carolina Court of Appeals in *Nies v. Town of Emerald Isle*, COA 15-169. *See* Appendix. The Nieses appeal because the decision involves a substantial question of law arising under the constitutions of the United States and North Carolina.

Plaintiffs also petition this Court, pursuant to Rule 15 of the North Carolina Rules of Appellate Procedure and N.C.G.S. § 7A-31(c), to certify the Court of Appeals' decision for discretionary review. The decision below is worthy of review because it conflicts with this Court's decisions on the location of the public beach, involves a novel and unsupportable interpretation of an important but never previously reviewed state statute, and involves issues of major public significance, including the scope of public beach access, the right of property owners to control access to their land, and the power of local government to occupy private property without compensation.

NOTICE OF APPEAL

Plaintiffs Gregory and Diane Nies hereby give notice of appeal pursuant to N.C.G.S. § 7A-30(1). The lower court's published decision, holding that Defendant

Town of Emerald Isle (Town) did not take private property by authorizing itself and the general public to use and occupy the Nieses' land, involves substantial questions arising under the Fifth Amendment to the United States Constitution, and the "Law of the Land Clause" of Article I, Section 19, of the North Carolina Constitution. At all stages of the proceedings, the Nieses argued that the Town's actions amount to an unconstitutional taking. They further argued, at all stages, that the "public trust doctrine" cannot justify the taking, without compensation. Similarly, throughout this litigation, the Town relied only on the public trust doctrine to support its claimed right to occupy private dry sand areas, declining to plead prescription or other easement doctrines.

ISSUES TO BE PRESENTED ON APPEAL

The appeal presents the following issues:

1. Do the public beach access rights inherent in the common law "public trust doctrine" burden privately owned dry beach lands lying above the mean high water mark, and permit the government and public to constitutionally occupy and use these private lands; or do common law public trust rights end at the mean high water mark, the boundary of state-owned tidelands?

2. Did the Court of Appeals err in holding that N.C.G.S. § 77-20—a statute never previously construed by the courts—modified common law precedent so as to

extend the public trust beach to inland private parcels, even though the statute itself defers to the common law and a construction expanding the public beach to private land is an unconstitutional taking?

3. Did the Court of Appeals err in holding that the Town did not unconstitutionally take the Nieses' dry sand private property by authorizing the public to drive and park on the land (for a fee paid to the Town) and/or by giving the Town itself the right to drive and park on private land, pursuant to Town ordinances purportedly implementing the public trust doctrine?

SUMMARY OF REASONS FOR CERTIFYING THE APPEAL AND GRANTING THE PETITION

This case involves constitutional issues of unusual and far-reaching importance. At its core, the case is about whether local government can convert indisputably private land into a public beach, without causing an unconstitutional taking. In North Carolina, the wet beaches lying seaward of the mean high water mark are state-owned property, and subject to a public right of use under the public trust doctrine. On the other hand, dry sand beach areas located landward of the mean high water mark are wholly private property. N.C.G.S. § 77-20(a); *Gwathmey v. State*, 342 N.C. 287, 293, 301, 464 S.E.2d 674, 678, 682 (1995). In the decision below, the Court of Appeals held that the public trust doctrine permits the government and public to drive on, and

use private dry sand areas, as well as state-owned wet beaches, free from the constitutional duty to compensate the owners of the land. Slip op. at 19-22.

To justify its decision, the Court of Appeals held, for the first time in state history, that privately owned dry beaches landward of the mean high water mark are limited and encumbered by public beach rights arising from the public trust doctrine. Slip op. at 14, 18. Acknowledging contrary decisions from this Court, the Court of Appeals further held that a statute—N.C.G.S. § 77-20(d), (e)—modified this Court's public trust decisions[1] and legislatively extended the public trust beach to upland, private dry beach areas. *Id.* at 14. The court concluded that the public trust beach ends on the landward side at the vegetation/dune line, rather than at mean high water mark, ensuring that all private dry beach areas are now part of the public trust beach and open for public use. *Id.* at 18.

Since (in the lower court's view) N.C.G.S. § 77-20 permissibly extended the public beach landward to private dry parcels, the court held the Nieses and other owners of such parcels have no right to complain that their property is being unconstitutionally taken when government officials and government-sponsored trespassers occupy their residential land. Slip op. at 19-20. It therefore upheld as constitutional the Town's practice and policy of (1) selling permits for the public to

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[1] The relevant portion of N.C.G.S. § 77-20 is set out in full on pages 19-20 of this brief.

drive on the Nieses' (and others') dry sand property and (2) allowing Town vehicles to regularly use such private parcels as a road, all without owner consent or compensation. *Id.* at 30-31

This decision conflicts with the decisions of this Court, the language of N.C.G.S. § 77-20 itself, and with fundamental constitutional takings principles, which jealously guard the right of property owners to control the privacy of their fee simple land. In effect, the Court of Appeals has re-written North Carolina property law so that core protections of the Fifth Amendment's Takings Clause and North Carolina's Law of the Land Clause do not apply to private dry sand parcels along the shore. Governments up and down the Atlantic coast may now treat these private parcels as public property without paying the owners a dime in compensation. The result is a massive transfer of valuable beachfront land from private to public hands, in conflict with this Court's precedent and basic constitutional procedure. This Court's decisions do not allow this. Nor does N.C.G.S. § 77-20. Indeed, the statute could not effect such a radical change to coastal property boundaries without itself causing an unconstitutional taking. *Purdie v. Attorney General*, 143 N.H. 661, 666-67, 732 A.2d 442, 447 (1999) (statute that extended the public trust to private dry sand areas caused a taking).

The government's constitutional inability to invoke the public trust doctrine to impose government or public driving on private dry parcels does not mean the public

has no way to access to dry beach lands. The public can acquire access by proving a prescriptive-type easement on the parcels it wants to use, by purchase, by private dedication, or as part of beach re-nourishment projects. *Concerned Citizens of Brunswick County Taxpayers Ass'n v. State ex rel. Rhodes*, 329 N.C. 37, 45-49, 404 S.E.2d 677, 682-85 (1991). But the government may not use the public trust doctrine—the only asserted basis for the Town's actions against the Nieses[2]—as a shortcut around these common law and constitutional procedures. The Court of Appeals' contrary decision represents a dramatic and unsupportable shift in North Carolina property law. Because the issues are of constitutional importance and substantial public concern, the Court should certify the appeal and grant the Petition.

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[2] The Court of Appeals referred briefly to the doctrine of "custom" in explaining its decision, while noting that this doctrine was not "fully" argued below. This is an understatement. Where it exists, customary law is a common law easement doctrine, not unlike prescription. It requires the claimant asserting an easement on private land as a "custom" to judicially prove a number of specific facts related to that specific parcel. *Trepanier v. County of Volusia*, 965 So. 2d 276, 289-90 (Fla. Dist. Ct. App. 2007). Here, the Town never pled the doctrine of custom, or its elements. It did not argue the issue before the trial court, and the trial court did not pass on it. Custom was accordingly never properly before the Court of Appeals, and the Nieses do not believe it is an issue in this case. However, if it is, the Nieses reject the doctrine as a basis for affirming the trial court's decision. When customary law is a viable source of law and properly pled (two things not present here), determination of a customary right on private land can only arise from an adversarial, fact-based judicial determination, a process that never took place in this case. Neither courts nor legislatures can decree a state-wide customary right, at least not without compensation. *Trepanier*, 965 So. 2d at 289; David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 1996 Colum. L. Rev. 1375.

STATEMENT OF THE CASE

The Nieses and four other property owners commenced this action in the Carteret County Superior Court in December 2011, by filing an Inverse Condemnation Memorandum of Action (MOA) under N.C.G.S. § 40A-51(b), and a related complaint. (R p 8). These pleadings alleged in part that the Town had taken the Nieses' property in violation of their state and federal constitutional rights.

The Town attempted to remove the complaint to the federal court for the Eastern District of North Carolina (R pp 102-104), but that court remanded the entire case to the state Superior Court. (R pp 147-158). The Nieses' case was then separated from the other plaintiffs and they proceeded to litigate on a pro se basis.

On August 25, 2014, Superior Court Judge Jack Jenkins granted the Town's motion for summary judgment on all the Nieses' claims, including their constitutional takings claims. (R p 757). Judgment was filed on August 26, 2014. (*Id.*). The Nieses filed their notice of appeal to the North Carolina Court of Appeals on September 17, 2014 (R p 758). On appeal, the Nieses' asserted only their takings claims, arguing that they, not the Town, had a right to summary judgment on those claims.

The Court of Appeals issued a published opinion on November 17, 2015. That court affirmed the trial court's grant of summary judgment to the Town, holding that the Town did not cause an unconstitutional taking of the Nieses' land. The Nieses

now timely appeal and petition the Court for discretionary review of the decision below.

STATEMENT OF THE FACTS

A. The Nieses' Property

In 2001, the Nieses bought a parcel of residential beachfront property in the Town of Emerald Isle (*see* R p 105 ¶ 1 (Town admission)). The Nieses acquired the property, 9909 Shipwreck Lane, through a fee simple deed. Since the purchase, the Nieses have lived in the home for much of each year, while occasionally renting it out during summer months. (*See* R p 8 ¶ 1).

Under both their deed and the law of this state, the Nieses' property is bounded on the seaward side by the mean high water mark. (R p 53 (survey); *id.* p 611 (survey)); N.C.G.S. § 77-20(a); *West v. Slick*, 313 N.C. 33, 60, 326 S.E.2d 601, 617 (1985). Tidelands seaward of the mean high water mark boundary (and of the Nieses' dry sand property), are State-owned property. *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 277 N.C. 297, 302, 177 S.E.2d 513, 516 (1970).

The Nieses' title thus includes dry beach land lying between the mean high water mark and the first line of vegetation or dunes. (R pp 53, 611). This area is effectively the Nieses' backyard. (R p 611). The area measures about 150 feet in

width (from mean high water mark to vegetation line) and 76 feet in length (parallel to the Atlantic), comprising approximately 11,000 square feet. (R p 611).

At the time of the purchase, the Town had a beach ordinance that allowed public driving only on the "hardpacked sand." (R p 526). Consistent with that ordinance, when the Nieses bought their land, the public in fact drove *only* on the wet beach, staying clear of the more inland, loose dry private sand areas. (R pp 245-248, 324).[3] The Nieses, who had frequented Emerald Isle long before they bought their home in 2001, repeatedly testified in their depositions that no driving occurred on the dry sand beach before their purchase.[4] *Id.* There is no recorded or adjudicated

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[3] The Court of Appeals badly distorted both the record and the Nieses' position in stating that (1) "[T]he record does not contain the Carteret County Beach Vehicular Ordinance, or any pre-1980 ordinances related to beach driving," slip op. at 5, and that (2) the Nieses made an "acknowledgment" that, " 'historically,' the public has been driving on private property dry sand beach." *Id.* at 6. Both are false. The original Town beach driving ordinance, which limited public use to "hardpacked" beach areas, is in the record at page 526. Plaintiffs explicitly pointed the Court to this material at oral argument. Further, the Nieses never conceded that the public drove on dry sand areas at the time they bought their property; they have actively disputed that, including at oral argument. Their position is supported by the original Town driving ordinance cited above, and by copious deposition testimony in the record. (R pp 245-248, 324).

[4] The Court of Appeals pointed to an affidavit by Frank Rush, which states that "beach driving has been allowed in the Town since its incorporation in 1957." Slip op. at 5. But, tellingly, the Rush affidavit never says driving occurred on *dry sand areas*. To the extent it can be read that way, the Rush testimony is rebutted by the Nieses' "no dry sand driving" testimony, (R pp 245-248, 324), and the Town's 1980 "hardpacked sand" driving ordinance. As such, the Rush affidavit cannot support summary judgment for the Town.

easement on the Nieses' title that gives the Town or public the right to drive on, or access, their property. (R p 611).

In 2003, the Town attempted, but failed, to secure an access easement on the Nieses' dry sand land to facilitate a Beach Renourishment Project. The Town sent the Nies a form easement that would have given the Town a perpetual access easement on their land. (R pp 55-59). The Nieses declined to sign this easement, however, and instead executed a temporary easement that expired on March 31, 2005. (R p 61). Finding this inadequate (R pp 630-631), the Town filed a complaint and a declaration of taking against the Nieses in the Carteret County Superior Court, to obtain a more expansive easement through a "quick take" eminent domain action. (R pp 75, 634-636).

Through this action, the Town immediately condemned a perpetual public and Town access easement over the dry sand portion of the Nieses' property. (R pp 633-635). The Nieses contested the taking in Superior Court (R pp 637-645). Approximately a year later, the Superior Court issued a "Consent Order Modifying Beach Re-nourishment Easement" (R pp 652-663) that significantly reduced the easement the Town acquired through the quick take procedure. The modified easement allowed the Town to access the Nieses' dry beach property only to inspect and restore erosion damage from major storms. (R pp 659-660). It did not give the public a right to access the Nieses' property, nor did it give the Town itself a right to

use the property for general municipal purposes, such as driving. (R pp 659-661). This limited easement's landward boundary is 100 feet inland of the mean high water mark existing at the time of the execution of the easement. (R p 77). The easement declares that it is not to be construed to interfere with the Nieses' right to use their property. (R p 661). The Town has acquired no other easement since then.

B. The Town Enacts and Enforces Laws Authorizing Public and Town Driving on the Nieses' Land

1. The Town Authorizes Public Driving on Private Dry Beach Areas, like the Nieses', for a Fee

In 2004, the Town amended its beach driving ordinance to potentially allow public driving on some areas of the dry sand. The ordinance specifically permitted public driving "primarily" on the "hardpacked sand" area between the sea and ten feet seaward of the dunes. This version left (at a minimum) a ten-foot strip of dry sand off-limits to driving.

In 2013, the Town re-enacted and amended the law. The new driving Ordinance—the law at issue here—expanded the public driving area to the "public trust beach," defined in Section 5-1 of the ordinance as "all land and water area between the Atlantic Ocean and the base of the frontal dunes." (*See* R pp 541, 549). The 2013 ordinance thus deleted the prior limitations on beach driving to "primarily hardpacked sand" as well as the prior driving boundary set at ten feet seaward of the dunes. The new public driving ordinance thus allows public driving on all private dry

sand areas seaward of the dunes, an area which encompasses the Nieses' dry sand property from the dunes to the mean high water mark.

Under the 2013 law, the public is allowed to drive on dry sandy beach land like the Nieses', between September and May (R p 88), upon paying a fee to the Town and obtaining a permit. (*Id.*). The ordinance gives the Town manager discretion to control public vehicle use on private land. (R pp 549-550). The Town unilaterally establishes the rules and requirements for public driving on private dry sand areas like that owned by the Nieses. (*Id.*).

The Town has issued many permits allowing the public to drive on the Nieses' land between the mean high water mark and dunes. In 2014, the Town issued 1,246 permits allowing driving on this area, generating $78,000 in income. (R p 682). Under authority of these Town permits, the public has actually driven on the Nieses' property and continues to regularly do so, leaving trash and tire ruts in their wake. (R pp 443:18; 462, 661-682 (photos)). "[I]n the permitted driving time, [the Nieses] get a lot of people who see that as their own personal dirt track." (R p 462:2-4). The driving public often includes people "hotdogging" in their cars and trucks. (R p 462:8-12).[5]

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[5] The Beach Driving Ordinance also sanctions governmental use of the Nieses' private property. The ordinance allows "[r]egulatory, contract, and research activities conducted by governmental officials and researchers," and "[c]onstruction activities (continued...)

2. The Town Imposes a Twenty-Foot Town Vehicle Lane on the Nieses' Property

In 2010, the Town enacted a different ordinance relating to private dry beaches which gave Town officials an exclusive driving lane on those private lands. (R p 98). The ordinance specifically stated:

> No beach equipment, attended or unattended, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes at any time, *so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand.*

(R p 98 (Section 5-102(a) (emphasis added)). It is undisputed that the strip of land lying "twenty feet seaward of the base of the frontal dunes" includes privately owned dry sand areas located landward of the mean high water mark, such as the Nieses' dry sand property. Until this ordinance, the Town had never claimed an exclusive vehicle lane on the strip of dry beach land immediately adjacent to the dunes. In 2011, the Town amended this ordinance to make the "twenty-foot from the dunes" driving lane applicable only from May 1 through September 14. (R p 545 (Town Code § 5-19(b))). In 2013, the Town amended the Ordinance again. This amendment reiterated that the law was intended to clear the way for "for unimpeded travel by

[5] (...continued)
specifically authorized by the town manager," to drive on dry beaches without seasonal (Sept.-May) limitation. Town Code § 5-65.

emergency vehicles and town service vehicles on the public trust beach area." (R p 541 (Town Code § 5-1); *id.* p 545 (Town Code § 5-19(a))).

Under authority of the ordinance,[6] Town vehicles of all varieties have driven on the Nieses' land in the new twenty-foot Town lane, and regularly continue to do so. (R pp 311-312, 461-463 (Nies deposition)). Some are "the police SUV's . . . . They go up and down. And the—the third class of vehicle is the four-wheeler, the quads." (R pp 463:2-5). "[T]hey stop and . . . park on what's clearly . . . our property: beach patrol, police, and they'll just sit and be there." (R p 463:13-15). The Town also uses the Nieses' property for routine services, like beach grading and garbage. For instance, "[G]arbage pickup trucks go back and forth three or four times a day. There are actually three different trucks that come by and they do that two or three times a day." (R p 461:21-24). Walking on the area is unsafe and sometimes impossible for the older Nieses. (R p 314:15-18 ("I would be run over like, you know, road kill."); *id.* p 315:5-12 ("they made what was the equivalent of a three-foot cliff, you'd need a stepladder to get up and down into the rest of our property because they

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[6] A number of North Carolina coastal communities have ordinances regulating beach activities. But few, if any, have laws explicitly giving the public and government the right to drive on all dry sand areas from the mean high water mark to the vegetation line and/or giving local government an exclusive driving lane on private dry sandy land near the dunes. Moreover, no North Carolina ordinance purporting to allow driving on private beach land under authority of the public trust doctrine has been tested in court.

wore such a deep rut. I mean, swear to God, we had to go to somebody else's house to get out of the beach because we couldn't get from one end of our property to our house.")).

Moreover, because the Town's unimpeded travel lane is defined on the landward side by an ambulatory boundary (dunes), that lane—and the associated Town traffic—has moved further into the Nieses' lot after storms displaced the dunes inland. (R p 738 (Nies affidavit)). For instance, in 2011, Hurricane Irene moved the dunes inland by approximately thirty feet. (*Id.*) Immediately afterward, the Town began driving "vehicles over the whole [newly eroded] area including some with caterpillar treads . . . municipal vehicles were already using an additional 30 feet of our property." (*Id.*).

The Nieses challenged the Town's application of its beach ordinances, and the associated occupation of their land, as an unconstitutional taking of property. The Carteret County court granted summary judgment to the Town, and the Court of Appeals recently affirmed that judgment.

REASONS TO CERTIFY THE APPEAL AND GRANT THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS, THE LANGUAGE OF N.C.G.S. § 77-20, AND CONSTITUTIONAL TAKINGS LAW

The core of lower court's decision is its conclusion that N.C.G.S. § 77-20 extended the public trust beach from state-owned tidelands to private dry beach uplands, like the Nieses', and divested the Nieses (and other private dry sand owners) of their constitutionally protected property rights. This ruling conflicts with this Court's decisions, the statute itself, and constitutional takings principles.

A. The Decision Below Conflicts with This Court's Public Trust Decisions

The public trust doctrine derives from the State's title to tidelands, which it acquired when the United States came into existence. *Shively v. Bowlby*, 152 U.S. 1, 11-14, 14 S. Ct. 548, 551-53, 38 L. Ed. 331 (1894); *Shepard's Point Land Co. v. Atlantic Hotel*, 132 N.C. 517, 44 S.E. 39, 41 (1903). Because of the public usefulness of tidelands and associated navigable waters, the State took title to such lands subject to a duty to hold and maintain such lands in trust for the public. *Neuse River Found., Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 118-19, 574 S.E.2d 48, 54 (2002). Even if the State sells tidelands, the public trust may remain. This is the public trust doctrine. Public rights on public trust tidelands include the right to "navigate, swim,

hunt, fish and enjoy all recreational activities in the watercourses of the State" and the right to access "the State's" beaches. N.C.G.S. § 1-45.1 (1994).

The location and scope of the public trust doctrine is determined by resort to the common law. N.C.G.S. § 77-20(d), (e). Applying common law, this Court has arrived at two important conclusions. First, it has held that State-owned tidelands end on the landward side at the mean high water mark. *West*, 313 N.C. at 60-61, 326 S.E.2d at 617. It has thus recognized that parcels inland of the mean high water mark are private. *Id.*; N.C.G.S. § 77-20(a).

Second, this Court has held that the public trust doctrine also terminates at the *mean high water mark*—the landward boundary of State tidelands. *Carolina Beach Fishing Pier*, 277 N.C. at 300-03, 177 S.E.2d at 515-16 ("The 'strip of land *between the high- and low-tide lines*' is called the foreshore" and "is reserved for the use of the public." (emphasis added)); *West*, 313 N.C. at 60, 326 S.E.2d at 617 (recognizing public rights on "land lying between the high-water mark and the low-water mark"). The Court thus recognizes that "the public trust doctrine is *not* an issue . . . where the *land involved is above water*." *Gwathmey*, 342 N.C. at 293, 464 S.E.2d at 678 (emphasis added).[7]

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[7] In *Concerned Citizens*, this Court said, in dicta: "We note dicta in the Court of Appeals opinion to the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner. As the statement (continued...)

B. The Lower Court's Construction of N.C.G.S. § 77-20 Conflicts With the Statutory Language, the State's Views, and Takings Law

The lower court was aware of this Court's decisions on the geographic (mean high water mark) limits of the public trust beach, Plaintiffs-Appellants Opening Brief at 24-27, but it refused to apply them. To justify this approach, the Court of Appeals concluded that a statute—N.C.G.S. § 77-20—altered this Court's common law public trust decisions and expanded the public trust beach area to include private dry parcels. Slip op. at 14.

As originally enacted, N.C.G.S. § 77-20 stated: "The seaward boundary of all property within the State of North Carolina, not owned by the State, which adjoins the ocean, is the mean high water mark." N.C.G.S. § 77-20(a). But, in 1998, the following sections were added:

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[7] (...continued)
was not necessary to the Court of Appeals opinion, nor is it clear that in its unqualified form the statement reflects the law of this state, we expressly disavow this comment." 329 N.C. at 55, 404 S.E.2d at 688 (citation omitted). "Obviously, this conclusion is far from judicial recognition of such public [trust] rights" on private dry sand areas. William A. Dossett, Note, *Concerned Citizens of Brunswick County Taxpayers Ass'n v. Holden Beach Enterprises: Preserving Beach Access Through Public Prescription*, 70 N.C. L. Rev. 1289, 1331 (1992). Indeed, the *Concerned Citizens* dicta did not overturn prior decisions, like *West* and *Carolina Beach*, terminating the public trust beach at the mean high water mark. Moreover, four years after *Concerned Citizen, Gwathmey* re-confirmed the public trust does not apply to dry lands. 342 N.C. at 293, 301, 464 S.E.2d at 678, 682.

(d) The public having made frequent, uninterrupted, and unobstructed use of the full width and breadth of the ocean beaches of this State from time immemorial, this section shall not be construed to impair the right of the people to the customary free use and enjoyment of the ocean beaches, which rights remain reserved to the people of this State under the common law . . . . These public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State.

(e) As used in this section, "ocean beaches" means the area adjacent to the ocean and ocean inlets that is subject to public trust rights. This area is in constant flux due to the action of wind, waves, tides, and storms and includes the wet sand area of the beach that is subject to regular flooding by tides and the dry sand area of the beach that is subject to occasional flooding by tides, including wind tides other than those resulting from a hurricane or tropical storm. The landward extent of the ocean beaches is established by the common law as interpreted and applied by the courts of this State. Natural indicators of the landward extent of the ocean beaches include, but are not limited to, the first line of stable, natural vegetation; the toe of the frontal dune; and the storm trash line.

The court below held that these amendments to N.C.G.S. § 77-20 establish that "at least some portion of privately-owned dry sand beaches are subject to public trust rights" and that "[t]he General Assembly has the power to make this determination through legislation, and thereby modify any prior [contrary] common law understanding of the geographic limits of these public trust rights." Slip op. at 14. Purporting to follow the statute, the lower court further held that the public trust beach now extends to the vegetation/dune line, not the mean high water mark, thus ensuring it covers all private dry sand areas. This is an error of tremendous constitutional importance.

1. The Court of Appeals' Construction of N.C.G.S. § 77-20 Conflicts with the Statute's Text

The most obvious problem with the Court of Appeals' construction of N.C.G.S. § 77-20 is its incompatibility with the statute's language. The plain language of the law states that public trust "rights remain reserved to the people of this State *under the common law*." N.C.G.S. § 77-20(d) (emphasis added). It further states "public trust rights in the ocean beaches are established in the common law as interpreted and applied by the courts of this State." And again: "[t]he landward extent of the ocean beaches is *established by the common law as interpreted and applied by the courts of this State*." *Id.* § 77-20(e) (emphasis added). There is no indication of any legislative intent to create public trust rights or areas beyond those recognized by courts applying common law.

Contrary to the decision below, the statute does not supercede, modify, or abrogate the common law regarding public beach rights, it *defers* to it. Properly read, the statute is simply a policy statement affirming the State's desire to protect, to the fullest extent, any court-identified, common law public trust rights. *Cf. Severance v. Patterson*, 370 S.W.3d 705, 719 (Tex. 2012) (The Texas Open Beaches Act "enforces the public's right to use the dry beach on private property where an easement exists and enforces public rights to use State-owned beaches . . . [the statute] by its terms does not create or diminish substantive property rights."). But, as previously shown,

the common law does *not* recognize public trust beach access rights on dry beaches landward of the mean high water mark.[8] *Gwathmey*, 342 N.C. at 293, 464 S.E.2d at 678. And, so, that is where the statute logically ends as well.

The State itself adheres to a "codification of the common law" construction of N.C.G.S. § 77-20, in conflict with the lower court. In 2003, in *Fabrikant v. Currituck County*, the Attorney General stated that N.C.G.S. § 77-20

> does *not* create any public rights on the dry sand portion of the beach. Beach rights exist only if the Courts of this State determine that such rights exist at common law. . . . The State of North Carolina does *not* rely on the statute to create public rights on the beaches, and it has no such effect.

(R pp 624, 626 (emphasis added)); *see also*, *Fabrikant v. Currituck County*, 174 N.C. App. 30, 48, 621 S.E.2d 19, 31 (2005) ("[T]he State represented that it was not contending that the statutory subsections created rights in the public to the dry sand beach."). Commentators have likewise noted that N.C.G.S. § 77-20(d), (e) were enacted as a mere "policy" statement designed to make clear that the original statute—Section 77-20(a)—did not limit the courts' common law rule-making in the public trust area. *See, e.g.*, Joseph A. Kalo, *The Changing Face of the Shoreline:*

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[8] Other state rules codify this understanding. *See* 15A N.C. Admin. Code 07H.0207 ("Public trust areas" are "all waters of the Atlantic Ocean and the lands thereunder *from the mean high water mark to the seaward limit of state jurisdiction . . .*") (emphasis added).

Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina, 78 N.C. L. Rev. 1869, 1895 (2000).

In sum, there is no evidence that N.C.G.S. § 77-20 was meant to repudiate the common law and create new rights, as the Court of Appeals held. To reach such a conclusion, the lower court had to ignore the statutory text, the history behind it, and the State's interpretation of the statute. This Court should review and reject the Court of Appeals' novel and unsupported view.

2. The Court of Appeals' Construction of the Statute Causes a Taking

The lower court's counterintuitive construction of N.C.G.S. § 77-20 deserves review for another reason: it causes a taking of property and conflicts with the principle that legislatures may not define away vested property interests—at least not without paying just compensation. Ironically, the Court of Appeals seemed to recognize this rule of law. Slip op. at 10. And yet, it refused to apply it when construing N.C.G.S. § 77-20 to newly impose public access rights on private land, in derogation of prior common law rules.

It is beyond dispute that legislatures cause a taking when they pass laws converting private property into public property. *Stop the Beach Renourishment, Inc. v. Florida Dep't of Environmental Protection*, 560 U.S. 702, 713, 130 S. Ct. 2592, 2601, 177 L. Ed. 2d 184 (2010) ("States effect a taking if they recharacterize as public

property what was previously private property."); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-65, 101 S. Ct. 446, 452-53, 66 L. Ed. 2d 358 (1980); *Bailey v. State*, 348 N.C. 130, 500 S.E.2d 54 (1998) (statute destroying vested rights caused a taking).

The Court of Appeals has given N.C.G.S.§ 77-20 this very character. In concluding that the statute extended the public trust beach to landward, private areas, and opened such areas to public and governmental occupation, the court below construed the statute to convert private land into public land, without compensation. This is a taking. *Purdie*, 143 N.H. at 666-67, 732 A.2d at 447 (statute extending the public trust beach to the dry sand caused a taking).

Courts are supposed to *avoid* construing statutes to violate the Constitution. *Matter of Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 616 (1977). Moreover, " 'statutes in derogation of the common law are to be construed strictly.' " *Price v. Edwards*, 178 N.C. 493, 101 S.E. 33, 36 (1919) (citation omitted). But here, the Court of Appeals adopted an extremely broad reading of N.C.G.S. § 77-20 and put the statute in conflict with constitutional takings provisions. And it did so without any support. The statute has never been previously construed by any branch of the State government to grant the public new (non-common law) access rights on private land.

The Court of Appeals seemed intent on construing the statute to extend public trust rights to private dry sand areas—despite the constitutional takings barrier to such

a reading—to appease "what the majority of North Carolinians understand as a 'public' beach." Slip op. at 18. This is disturbing. Property rights are determined by the rule of law, not speculation about majority expectations.[9] *Trustees of Univ. of N.C. v. Foy*, 5 N.C. 58, 88 (1805).[10] Indeed, "[t]he Constitution . . . is designed to protect individual citizens and groups against certain decisions that a majority of citizens might want to make, even when that majority acts in what it takes to be the general or common interest." Ronald Dworkin, *Taking Rights Seriously* 132-33 (1977); *Foy*, 5 N.C. at 88. Even if *all* the people think it's a good idea to invade private dry sand property, the Court of Appeals does not have license to ignore the background principles of North Carolina property law, principles which limit the public trust to the wet beach and which require the government to prove the existence of prescriptive easements if it wants access to additional, private areas—or to buy land through the eminent domain process. *Id.*

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[9] There is no evidence in the record to support the lower court's view of what the "majority" believes. It is pure speculation, based on the equally unsupported speculations of a law review author.

[10] The *Foy* court stated: "individuals shall not be so deprived of their liberties or property, unless by a trial by Jury in a court of Justice, according to the known and established rules of decision, derived from the common law, and such acts of the Legislature as are *consistent with the constitution*." 5 N.C. at 88 (emphasis added).

C. The Court of Appeals' Decision Unsettles Beach Property Boundaries and Rights

The lower court's conclusion that the public trust beach now extends to the shifting and erosion-sensitive vegetation line, rather than the mean high water mark, is not just wrong on the law, it creates great uncertainty regarding property boundaries and sets the stage for increased conflict between homeowners and beachgoers.[11] *Severance*, 370 S.W.3d at 724. Due to the decision below, the public beach is primed to move farther inland and onto more private, and residentially developed beachfront property, each time storms cause the vegetation line to migrate landward. And there is no stopping point for this process. With each additional landward shift of the vegetation line, and exposure of new private dry sand parcels, the government can claim that land, even if the public has never before occupied it. This system "would result in depriving oceanfront property owners of a substantial right . . . without requiring compensation or proof of actual use of the property allegedly encumbered

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[11] The lower court's decision to make the vegetation line the new public trust boundary contrasts starkly with the traditional mean high water mark boundary for public beaches. The latter boundary is based on the *average of high tides over an 18.6 year period,* but the vegetation/dune line boundary is not; it is based on wherever the elements happen to do to the line. The vegetation and dunes can shift inland quickly and drastically—instantly altering property rights and expectations—with every extreme weather event.

whenever natural forces cause the vegetation line to move inland so that property not formerly part of the dry beach becomes part of the dry beach." *Severance*, 370 S.W.3d at 726.

Today, the Nieses' and others' developed, front row beach lots are being opened to the public. As storms move the vegetation line, it will be the second, and then third, row of homes that come to be on the now-public trust impressed dry sand. Conflict is inevitable between homeowners used to family privacy, and beachgoers told by the lower court they can use any private property that comes to be sandy instead of vegetated.

The Constitution and common law normally mediate these conflicts. If the public wants access to private land, it has the right to condemn easements and pay just compensation or judicially prove prescriptive-like easements on each parcel it wishes to access. *Concerned Citizens*, 329 N.C. at 45-49, 404 S.E.2d at 682-85; *Severance*, 370 S.W.3d at 725. But outside these avenues, property owners have a right to be left alone. *Severance*, 370 S.W.3d at 727 ("it does not follow that the public interest in the use of privately owned dry beach is greater than a private property owner's right to exclude others from her land when no easement exists"). The lower court's decision wrongly jettisons this long-standing framework, allowing the government and public to continually invade private oceanfront parcels, without consent or compensation or proof of an easement, based on alleged legislative fiat (N.C.G.S.

§ 77-20). The Court should review this case to re-settle property understandings turned upside down by the lower court's decision.

II. THE DECISION BELOW CONFLICTS WITH THE SETTLED PRINCIPLE THAT THE GOVERNMENT IS LIABLE FOR AN UNCONSTITUTIONAL TAKING WHEN IT OCCUPIES PRIVATE LAND

After the Court of Appeals interpreted N.C.G.S. § 77-20 to impose the public trust on private dry sand areas, like the Nieses', it concluded that it was not a taking for the Town to authorize the public to drive on, park and use the Nieses' land, or for the Town itself to use the land for a roadway. Slip op. at 19-21. This conflicts with basic takings precedent.

It is settled that the takings provisions in the federal and state constitutions prohibit the government from authorizing a physical occupation of property, or carrying out such an occupation itself, without just compensation. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831-32, 107 S. Ct. 3141, 3145-46, 97 L. Ed. 2d 677 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35, 102 S. Ct. 3164, 3175-76, 73 L. Ed. 2d 868 (1982). The Constitution is so strict in this regard because a government-sponsored occupation of property destroys the owner's entire bundle of rights. *Loretto*, 458 U.S. at 435. Moreover, it immediately eviscerates the right most essential to the concept of *private* property: the individual's right to control or deny access to his or her own private land. *Id.*; *Kaiser Aetna v.*

United States, 444 U.S. 164, 180, 100 S. Ct. 383, 393, 62 L. Ed. 2d 332 (1979). Thus, any regulation or act that causes a physical occupation of property is automatically a taking, regardless of the purposes of the invasion or its economic effect. *Nollan*, 483 U.S. at 831-32.

In this case, the Town enforced its ordinances to authorize the public and Town officials to drive, park on, and use private dry sand property. This divested the Nieses and others of any ability to control the time, place, and manner of public or governmental access to their private dry sandy lands, and to deny access when deemed destructive. This is a quintessential taking. *Id.*; *see also*, *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) (noting that "one of the most valued [property rights] is the right to sole and exclusive possession—the right to exclude strangers, or for that matter friends, but especially the Government" and finding a taking occurred where government intruded on private land for environmental reasons).

Unfortunately, the Court of Appeals' decision failed to subject the Town's action to the strict scrutiny required by Supreme Court precedent and thus, to give the Nieses' property rights the constitutional protection they are due. If the Town wants to occupy the Nieses' land as a Town service road and sell permits for the public to drive and park on the land (and damage it), the Constitution requires compensation. *Nollan*, 483 U.S. at 831-32; *Kaiser Aetna v. United States*, 444 U.S. at 180.

In fact, the Court of Appeals should have found the Town liable for a taking, even if the public trust doctrine authorizes some limited public pedestrian access across private dry sand property (something this Court has never held). This is because the Town has gone far beyond just enforcing recreational or pedestrian access to the sea. It sells permits for repetitive and destructive public driving and parking. (R pp 88, 682). It decides when and under what conditions such activity occurs. Town Code §§ 5-60-66; (*see also*, R pp 549-550). The Town gives itself (and other government officials) the right to use the private property. *See* Town Code § 5-65. The Town bars dry sand owners from leaving personal property on their own land so the Town can have an exclusive driving lane. *See* Town Code § 5-19 (R p 545). The Town assumed dominion over the Nieses' private dry sand parcel. If it applies, the public trust doctrine does not allow the Town to impose burdens above and beyond public access to the sea, and to empty property owners of all (or almost all) incidents of fee simple ownership, without just compensation.[12] *Weeks v. N.C. Dep't of Natural Res. & Cmty. Dev.*, 97 N.C. App. 215, 226, 388 S.E.2d 228, 234 (1990); *Bell v. Town of Wells*, 557 A.2d 168, 176-78 (Me. 1989) (statute expanding public trust rights on

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[12] The Town cannot immunize itself from takings liability in allowing public and Town occupation of dry beaches by asserting it is just exercising its police powers over the beach. *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950).

private land beyond those traditionally recognized caused a taking). The Court should review the Court of Appeals' contrary decision.

III. THE DECISION BELOW CONCERNS PROPERTY RIGHTS AND BEACH ACCESS ISSUES OF SUBSTANTIAL PUBLIC INTEREST

As should be apparent, this case involves issues of incredible importance to the people of this State and to government entities, including the State itself. First, it involves the issue of whether the common law public trust doctrine provides public access to private shoreline parcels along the Atlantic coast, access which the government would otherwise have to acquire through proof of prescriptive easements or purchase. Relatedly, the case involves the meaning of a never-before construed state statute—N.C.G.S. § 77-20—and whether the legislature passed this law to overturn, *sub silentio*, the common law decisions of this Court, so as to extend the public beach to private land. These issues effect the expectations, rights, and finances of property owners, the public, and government. Joseph J. Kalo & Lisa Schiavinato, *Customary Right of Use: Potential Impacts of Current Litigation to Public Use of North Carolina's Beaches*, 6 Sea Grant Law & Pol'y J. 26, 52 (2014) ("Whether the public has the . . . right to use the State's dry sand beaches and, if that right exists, how that will affect the rights of oceanfront property owners are critical questions that will shape the character and economy of coastal North Carolina."). And overshadowing these state concerns is the constitutional issue of whether the public

trust immunizes the government from takings liability when it invades and totally consumes private beachfront land.

The decision below has the most immediate impact on front-line beach property owners the length of the coast, as they now have no control over their dry sand areas, and current public beach users, but its ramifications reach much deeper. Because the lower court made the vegetation line into the new public beach boundary, and that line is easily displaced onto new inland areas by storms, all barrier island properties are now threatened with a future government take-over. The decision below makes clear that effected property owners have no recourse to the Constitution. Under the Court of Appeals' opinion, beach property rights are as unpredictable as the next storm, and land titles, as fragile as the beach grass that lines the coast.[13]

Even before the decision below, it was clear to many that these issues were deserving of this Court's attention. *See, e.g.*, Kalo & Schiavinato, *Customary Right of Use*, 6 Sea Grant Law & Pol'y J. at 52 ("Legal resolution [of the dry sand property rights issue] from the courts is needed at this point to provide clarity and structure, for the government and the public."). The Court of Appeals' opinion has removed any

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[13] Dry sand owners may hold title and pay taxes on their dry beach land, but the decision below makes clear that the government really owns this type of property, and now holds an uncompensated, contingent interest in any oceanfront area which may become part of the dry beach in the future due to landward migration of the vegetation line. At that point can do whatever it wants—including occupying it for public use.

doubt and crystalized the important public trust and dry sand private property issues facing this state in a direct and dramatic fashion. The Court should quickly grant review to correct the lower court's decision and bring certainty, predictability, and constitutional propriety back to the state's public trust doctrine and beach access issues. At stake are the titles and rights of thousands of current and future beach front property owners, and the viability of the "rule of law"—under the constitutional and common law system—in the regulation of public beach access and private property rights.

ISSUES TO BE PRESENTED FOR REVIEW

If the Court grants review, Petitioner intends to brief these issues:

1. Do the public beach access rights inherent in the common law "public trust doctrine" apply to privately owned dry beach lands lying above the mean high water mark, and permit the government and public to constitutionally occupy such lands; or do public trust rights end at the mean high water mark, the boundary of state-owned tidelands?

2. Did the Court of Appeals err in holding that N.C.G.S. § 77-20—a statute never previously construed by the courts—modified common law precedent so as to extend the public trust beach to inland private parcels, even though the statute itself

defers to the common law and a construction expanding the public beach to private land is an unconstitutional taking?

3. Did the Court of Appeals err in holding that the Town did not unconstitutionally take the Nieses' dry sand private property by authorizing the public to drive and park on the land (for a fee to the Town) and/or by giving the Town itself the right to drive and park on private land, pursuant to Town ordinances purportedly implementing the public trust doctrine?

Respectfully submitted, this 9th day of December, 2015.

Pacific Legal Foundation

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N.C. R. App. P. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a copy of the foregoing NOTICE OF APPEAL UNDER N.C.G.S. § 7A-30(1) (CONSTITUTIONAL QUESTION) AND PETITION FOR DISCRETIONARY REVIEW UNDER N.C.G.S. § 7A-31(c) on counsel for the Appellee by depositing a copy, contained in a first-class postage-paid wrapper, into a depository under the exclusive care and custody of the United States Postal Service, addressed as follows:

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This the 9th day of December, 2015.

Electronically submitted
J. DAVID BREEMER